

APPEAL NO. 160596

FILED JUNE 13, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on July 8, 2015, with the record closing on March 3, 2016, in Fort Worth, Texas, with (hearing officer)I presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to reflex sympathetic dystrophy (RSD)/complex regional pain syndrome (CRPS); (2) the date of maximum medical improvement (MMI) is October 18, 2014; and (3) the respondent's (claimant) impairment rating (IR) is 10%.

The appellant (carrier) appealed the hearing officer's MMI and IR determinations, contending those determinations are not supported by the evidence. The carrier pointed out in its appeal that the hearing officer adopted a certification that he indicated in his decision was significantly inconsistent with any other examination findings. The appeal file does not contain a response from the claimant to the carrier's appeal.

The hearing officer's determination that the compensable injury of (date of injury), does not extend to RSD/CRPS was not appealed and has become final pursuant to Section 410.169.

DECISION

Reversed and remanded.

The parties stipulated in part that the claimant sustained a compensable injury on (date of injury), and that the accepted compensable injury is a left elbow/forearm strain, left trapezius strain, and left rhomboid strain. Medical records in evidence state that the claimant's left shoulder was injured when a co-worker shoved boxes at the claimant on an assembly line.

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Texas Department of Insurance, Division of Workers' Compensation (Division) shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The hearing officer determined that the claimant reached MMI on October 18, 2014, with a 10% IR as certified by (Dr. I), the first designated doctor appointed by the Division.

Dr. I initially examined the claimant on October 18, 2014, and certified that the claimant reached MMI on October 10, 2014, with a 10% IR using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. I noted diminished range of motion (ROM) measurements of the claimant's left shoulder and left elbow. The hearing officer noted in his discussion that the claimant's ROM measurements taken in Dr. I's examination "are significantly inconsistent with any other examination findings." The hearing officer also noted that video surveillance in evidence shows the claimant "has significantly more use of his left arm than what the subjective complaints in the medical records would indicate." The hearing officer's statements regarding Dr. I's first MMI/IR certification are supported by the evidence.

The claimant was next examined by (Dr. M), the post-designated doctor required medical examination doctor. Dr. M examined the claimant on December 2, 2014, and certified that the claimant reached MMI on August 3, 2014, with a 0% IR. Dr. M noted in his narrative report that the claimant voluntarily restricted his left upper extremity ROM testing and gave a minimal effort during the examination. Dr. M stated that "I feel that [the claimant] reached probable clinical [MMI] two months following his injury . . ." and "I feel he was probably at [MMI] on August 3, 2014. . . ." The hearing officer noted in his discussion in part that Dr. M's certification is not adoptable because Dr. M described his date of MMI as "probable," and because it was unclear that Dr. M rated the entire compensable injury. The hearing officer's statements regarding Dr. M's MMI/IR certification are supported by the evidence.

The hearing officer stated in his discussion that because Dr. M's MMI/IR certification is not adoptable and Dr. I's MMI/IR certification did not appear to be

consistent with the claimant's abilities or objective testing, the claimant was referred back to Dr. I for a re-examination.

Dr. I re-examined the claimant on August 22, 2015. Dr. I stated on his August 22, 2015, Report of Medical Examination (DWC-69) that the claimant reached MMI on "[October 18, 2014]." However, in his attached narrative report, Dr. I stated that "in my professional opinion, the [claimant] reached [MMI] on October 10, 2014," and "based upon the accepted compensable injuries of left elbow/forearm strain, left trapezius strain and left rhomboid strain, the [claimant] reached [MMI] on October 10, 2014, with a whole person [IR] of 10%." Dr. I also stated in his narrative that "[s]ince it was determined the [claimant] had reached [MMI] on October 18, 2014, he was evaluated for an [IR] based upon findings on that date." Dr. I used the claimant's ROM measurements taken during his October 18, 2014, examination of the claimant in assessing the 10% IR.

There is an internal inconsistency between the MMI date Dr. I certified in his narrative report and the MMI date Dr. I certified on the DWC-69. Because the narrative report and DWC-69 list different dates regarding when the claimant reached MMI, we do not consider that internal inconsistency to be a clerical error that can be corrected. See Appeals Panel Decision (APD) 130739, decided May 7, 2013. Furthermore, we note the hearing officer in his discussion specifically discounted Dr. I's first MMI/IR certification certifying that the claimant reached MMI on October 10, 2014, with a 10% IR because the claimant's ROM measurements were significantly inconsistent with any other examination findings, and because the video surveillance in evidence shows that the claimant has significantly more use of his left arm than what the subjective complaints in the medical records would indicate. Despite noting these inconsistencies, the hearing officer adopted Dr. I's second MMI/IR certification, which is based on the same ROM measurements the hearing officer found inconsistent and initially rejected. For these reasons, we reverse the hearing officer's determinations that the claimant reached MMI on October 18, 2014, with a 10% IR.

There is one other MMI/IR certification in evidence, which is from (Dr. S). Dr. S was appointed by the Division as designated doctor subsequent to Dr. I's examinations to determine whether the compensable injury extends to RSD/CRPS, and MMI and IR.

Dr. S examined the claimant on February 12, 2016. Dr. S opined that the compensable injury does not extend to RSD/CRPS, and provided alternate MMI/IR certifications. In the first MMI/IR certification Dr. S certified the claimant had not reached MMI based on RSD/CRPS. As noted above the hearing officer's determination that the compensable injury does not extend to RSD/CRPS was not appealed and has

become final. Dr. S's MMI/IR certification that the claimant has not reached MMI based on RSD/CRPS cannot be adopted.

Dr. S also provided an MMI/IR certification certifying the claimant reached MMI on June 17, 2014, with a 0% IR based on the compensable injury as accepted by the carrier and stipulated to by the parties. The hearing officer noted in his discussion that "[Dr. S's] date of MMI is flawed in the same way [Dr. M's] opinion was deficient. [Dr. S] just picked a date two weeks after the date of injury. It is not based on an examination or the medical records. This opinion is not adoptable." In evidence are medical records from Concentra Medical Centers dated June 16, 2014, and July 14, 2014, noting diagnoses of left elbow and forearm sprain/strain and left trapezius muscle strain. Both of these records show diminished ROM measurements of the left shoulder and recommended continued therapy. The hearing officer's discussion regarding Dr. S's MMI/IR certification is supported by sufficient evidence.

There is no MMI/IR certification in evidence that can be adopted. Accordingly, we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

SUMMARY

We reverse the hearing officer's determinations that the claimant reached MMI on October 18, 2014, with a 10% IR, and we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

REMAND INSTRUCTIONS

Dr. S is the designated doctor in this case. On remand, the hearing officer is to determine whether Dr. S is still qualified and available to be the designated doctor. If Dr. S is no longer qualified or is not available to serve as the designated doctor, then another designated doctor is to be appointed to determine the claimant's MMI and IR for the (date of injury), compensable injury.

The hearing officer is to advise the designated doctor that the (date of injury), compensable injury extends to a left elbow/forearm strain, left trapezius strain, and left rhomboid strain. The hearing officer is also to advise the designated doctor that the (date of injury), compensable injury does not extend to RSD/CRPS.

The hearing officer is to request the designated doctor to give an opinion on the claimant's MMI. The designated doctor is to consider all of the medical records, including those from Concentra Medical Centers dated June 16, 2014, and July 14, 2014. The assignment of an IR is required to be based on the claimant's condition as of

the MMI date considering the medical records and the certifying examination and according to the rating criteria of the AMA Guides and the provisions of Rule 130.1(c)(3). After a new certification of MMI/IR is submitted, the parties are to be provided with the designated doctor's DWC-69 and narrative report. The parties are to be allowed an opportunity to respond. The hearing officer is to determine the issues of MMI and IR consistent with this decision.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **THE TRAVELERS INDEMNITY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
d/b/a CSC-LAWYERS INCORPORATING SERVICE COMPANY
211 EAST 7TH STREET, SUITE 620
AUSTIN, TEXAS 78701-3218.**

Carisa Space-Beam
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Margaret L. Turner
Appeals Judge